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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1625

IMAGE CARRIER CORPORATION, *et. al., Petitioners*

v.

ABRAHAM D. BEAME, MAYOR OF NEW YORK CITY, *et. al., Respondents*

ALLIED PRINTING TRADES COUNCIL, AFL-CIO, *Intervenors*

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY FOR LEAVE TO FILE BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Center on National Labor Policy hereby respectfully moves pursuant to this Court's Rule 42 for leave to file its brief *amicus curiae* in support of the petition for a writ of certiorari. Consent was sought from all parties. The Mayor of New York City, *et. al.,* respondents, and the petitioners gave their permission. The intervenors did not. All of these documents have been filed with the clerk.

The accompanying brief urges this Court to grant the petition for a writ of certiorari to the United States Court of Appeals in the matter of *Image Carrier*

Corporation, et. al. v. *Abraham D. Beame, Mayor of New York City, et. al.*, 567 F.2d 1197 (2nd Cir. 1977).

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers. Private pressure groups, such as organized labor groups, have a history of significant impact on the rights of the public, consumers, taxpayers, and workers. As this Court recognized in *Connell Construction, Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers. . . ." When organized labor pressure is supported by a state government policy, as in the case at bar, significant questions are raised concerning the civil rights of other affected parties—the public, consumers, taxpayers, and workers.

The Center, as a public interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to collective rights of pressure groups such as labor unions. Where state policy gives an advantage to a private association through business favors, the state is answerable for the impact on the rights of individuals.

Because Center on National Labor Policy can bring to this case a diverse perspective not presently represented, the Center's participation can assist the Court in obtaining full consideration of public interest issues.

Accordingly, Center on National Labor Policy respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF *AMICUS*

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers.

When organized labor pressure is supported by a government policy favoring employment of union members on government projects to the exclusion of non-

affiliated workers, significant constitutional questions are raised concerning the individual rights of other affected parties. The Center, as a public interest organization, believes that the individual rights of workers, taxpayers, consumers, and public citizens should be paramount to the collective privileges of pressure groups such as labor unions. Where state action undergirds the coercive power of such groups, the impact on the public interest may be substantial. Consequently, the Center's concerns about this impact are significant.

Further background and interests of *amicus* have been detailed in the preceding motion for leave to file this brief.

I. The Court Of Appeals Erred In Not Finding A Violation Of The First Amendment Where The Government Policy Of Requiring Union Plant Status As Prerequisite To Bidding On Certain Government Printing Contracts Discriminatorily Discourages Freedom To Join In, Or To Refrain From, Organizing Unions And Collectively Bargaining.

The court of appeals puts a gloss on national labor policies and so misconstrues their meaning as to allow forced association in violation of the first amendment. Over a strong dissent, 567 F.2d at 1203-06 and n.2 (Anderson J., dissenting), the court decided (2-1) that New York City discriminatory printing contract policy was protected by a national policy to "foster" collective bargaining and a state policy to "promote" collective bargaining. 567 F.2d at 1203. The majority mistakes the means for the end; collective bargaining was *not* the end sought to be promoted, but rather the "right of employees *freely* to organize" N.Y. Labor Law § 700 (McKinney 1977) (emphasis added). The state is hardly promoting *freedom* to organize when its avowed purposes are to *coerce* organizing and collective bargaining with economic might.

Even if forced collective bargaining were a proper state function, the majority opinion does not provide an adequate consideration of the individual rights offended to justify the discriminatory policy as required by *Wooley* v. *Maynard,* 430 U.S. 705, 715-16 (1977).

The First Amendment protects various forms of individual expression and concomitant associations. The Constitution does not allow abridgement of associational rights whether based on "political, *economic,* religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP* v. *Alabama,* 357 U.S. 449, 460, 461 (1958) (emphasis added).

Many workers express a preference to work non-union. They prefer not to be a part of a labor organization and they prefer to bargain independently for their employment contracts. If a worker evaluates his *economic* interests and determines that he prefers to make his own employment contract and not to throw his lot in with those workers who have organized and are bargaining collectively, the First Amendment protects that determination. The government may not make the *economic* determination for the worker. Rather, the state should refrain from coercing the worker so that he can make his decision by free choice.

The majority of the court of appeals suggests that the government policy might not actually be *effective* in coercing non-union workers into joining a union. 567 F.2d at 1203. But unconstitutional government policies are not left standing because they do not meet a measure of total effectiveness. Even that the government "has taken no direct action . . . to restrict the

right of petitioner's members to associate freely, does not end inquiry into the effect of the . . . order." *NAACP* v. *Alabama,* 357 U.S. 449, 461 (1958). Of course, the government here has taken action *directly* designed to promote labor union associations so inquiry should hardly be curtailed. Here the government action is designed to totally exclude non-union workers from government flat-form printing contracts. Consequently, the effect of closing the printing market for government flat-forms in a metropolis the size of New York City is strong government action and should hardly be treated so lightly as by the majority.

The majority also implies that "the total printing work available in and around New York City . . ." might be considered as reducing the effect of the government's anti-nonunion worker policy. 567 F.2d at 1203. It is error to imply that the availability of adequate work might leave standing a government policy offensive to the Constitution. Even if alternate work comprised an adequate printing market so that tangible factors such as plant capacity were equal as between non-union plants and union plants, the court could not claim that economic opportunity was equal. *See, eg., Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954) (Even where tangible factors of discriminatorily segregated facilities are equal, educational opportunities cannot be equal). This inequity must be so because union plants have access to the entire printing market while the government denies non-union plants access to the government flat-form portion of that market.

Just as in *Brown,* the government's action is a cancer which affects the whole city. Not only are non-union workers denied economic opportunities, but the tax-

payers and consumers of the city must bear any economic burden which results from the artificially reduced scope of competitive bidding. The additional affront to the broad public interest serves as an indication that the evil policy here deserves strict scrutiny on appeal.

Plainly, the government policy against non-union printing plants is a mighty thrust at economically coercing non-union worker association with labor organizations. This state activity is sufficiently offensive to require a close examination of the violation of First Amendment associational rights.

II. The Court Of Appeals Additionally Erred In Not Finding A Violation Of The First Amendment Where The Government Policy Of Requiring Affixation Of The Union Label To Government Flat-Forms Promotes A Policy Of Involuntary Association With Union Organizations In Violation Of The First Amendment.

The majority on the court of appeals treated in summary fashion the affixation of the union label. Fortunately, the Constitution requires a higher standard of review when the government uses its power to promote ideas. Any intrusion on the opposite ideas of others must be well justified. *Wooley* v. *Maynard,* 430 U.S. 705, 715-17 (1977). The government's requirement that the union label be affixed to flat-forms is an evil additional to its policy of discrimination against non-union printing workers. By putting the union label on its official forms, the government gives an open, official, and promotional approval to its discriminatory policy. The majority implies that the union label is merely craft-related. *See* 567 F.2d at 1203, n.19. No doubt the label is that used by printing unions. But at bottom, the label is not affixed unless the labor was all

union. The advertising and promoting of the union plant concept by way of the union label tells all the world that the government does not permit non-union laborers to work on the printing of such forms. Thus, the Court is not merely faced with government engaged in discrimination, but government openly proclaiming and promoting the discrimination.

Assuming, arguendo, that the discrimination itself were benign, the promotion of discrimination may not pass constitutional muster. For example, while a government grant to nazis to study nazism might somehow be valid, it is another matter for the government to put the nazi swastika on its forms. In doing so it promotes a private, non-governmental function which many of its private citizens who must use the forms do not wish to support or promote. At the same time, the swastika presented in concert with the coercive power of the governmental imprimatur on the forms can chill the First Amendment freedoms of citizens who have opposite ideas. Thus in *Wooley* v. *Maynard,* 430 U.S. 705, 715-17 (1977), this Court held that the government's promotion of the innocuous phrase "Live Free or Die" on government license plates used by private citizens was an affront to the First Amendment. Surely, the government's promotion of the union label on the millions of flat-forms that private citizens must use, laden as it is with a much broader affront to the public interest and individual rights cannot escape constitutional scrutiny.

While the majority opinion in the court below leaves the impression that requiring the printing union label on government forms is either merely craft-related or perhaps even beneficial, it is actually government sponsorship of worker coercion that offends the First Amendment rights of workers and the public, and demands an impartial review by this Court.

CONCLUSION

That concept of national labor policy which promotes freedom of choice by the worker is sometimes reflexively misconstrued to promote unionism over voluntary non-unionism. To the extent that a government would step into the workplace and makes the choice for the worker, the Constitution stands as a bar. By withholding government flat-form printing projects from non-union workers, the government here has overstepped its bounds. Compounding its offense, the government further extols the merits of discriminating against non-union workers by displaying the union label on such printing. This action may not be glossed over by a reviewing court as a harmless or even beneficial policy. It has serious implications detrimental to large segments of the public and deserves careful judicial scrutiny. Consequently, Center on National Labor Policy respectfully requests that this Court grant the petition for certiorari and strike down the offending law as unconstitutional.

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